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January 25, 2010

***Via electronic filing: [www10.tceq.state.tx.us/epic/efilings](http://www10.tceq.state.tx.us/epic/efilings)***

LaDonna Castañuela

Texas Commission on Environmental Quality

Office of Chief Clerk, MC-105

12100 Park 35 Circle

Austin, Texas 78753

Re: SOAH Docket No. 582-08-2186; TCEQ Docket No. 2006-0612-MSW; Permit  
No. MSW-249-D; Waste Management of of Texas, Inc.

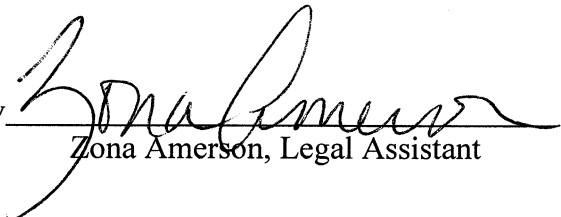
Dear Ms. Castañuela:

Enclosed for filing in the above referenced matter is *Northeast Neighbors Coalition's Exceptions to Supplemental Proposal For Decision*.

Thank you for your attention to this matter.

Sincerely,

BLACKBURN CARTER, P.C.

by   
Zona Amerson, Legal Assistant

Enclosure

c:

The Honorable Roy Scudday  
Administrative Law Judge  
State Office of Administrative Hearings  
300 West 15th Street, Ste. 502  
Austin, Texas 78711

***Via Facsimile & Federal Express***

All Parties of Record

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January 25, 2010

***Via Facsimile: (512) 475-4994***

***and Federal Express***

The Honorable Roy Scudday  
Administrative Law Judge  
State Office of Administrative Hearings  
300 West 15th Street, Ste. 502  
Austin, Texas 78711

Re: SOAH Docket No. 582-08-2186; TCEQ Docket No. 2006-0612-MSW;  
Application of Waste Management of Texas, Inc. for a Municipal Solid Waste  
Permit Amendment No. MSW-249D

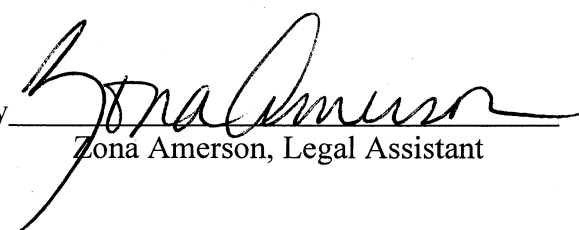
Dear Judge Scudday:

Enclosed is NORTHEAST NEIGHBORS COALITION'S EXCEPTIONS TO SUPPLEMENTAL PROPOSAL FOR DECISION on the remanded issue of hours of operation in the above referenced proceeding. All parties of record are being copied pursuant to the Certificate of Service attached to the filing. If you have any questions, please feel free to call our office at (713) 524-1012.

Sincerely,

BLACKBURN CARTER, P.C.

by

  
Zona Amerson, Legal Assistant

Enclosure

c: Service List

SOAH DOCKET NO. 582-08-2186  
TCEQ DOCKET NO. 2006-0612-MSW

IN THE MATTER OF THE APPLICATION	§	BEFORE THE STATE OFFICE
OF WASTE MANAGEMENT OF TEXAS,	§	
INC., FOR A MUNICIPAL SOLID WASTE	§	OF
PERMIT AMENDMENT PERMIT NO.	§	
MSW-249-D	§	ADMINISTRATIVE HEARINGS

**NORTHEAST NEIGHBORS COALITION'S EXCEPTIONS  
TO SUPPLEMENTAL PROPOSAL FOR DECISION**

TO THE HONORABLE ADMINISTRATIVE LAW JUDGE:

COME NOW Northeast Neighbors Coalition and aligned Parties (collectively "NNC") and file their Exceptions to the Administrative Law Judge's Supplemental Proposal for Decision ("PFD").

**I. BACKGROUND AND NNC POSITION**

On October 6, 2009 the Texas Commission on Environmental Quality ("TCEQ" or "Commission") remanded to the Administrative Law Judge ("ALJ") the issue of whether the Waste Management of Texas, Inc. ("WMTX"), Austin Community Landfill's ("ACL") hours of operation were appropriate. After a December 2, 2009 hearing on the merits addressing only this issue, the ALJ issued a Supplemental PFD on January 5, 2010 recommending that the Commission issue a permit to WMTX with the existing operating hours, 9:00 p.m. Sunday through 7:00 p.m. Saturday and, if necessary, from 7:00 a.m. to 4:00 p.m. on Sunday. NNC strongly disagrees with the ALJ's recommendation that the Commission issue the permit with existing operating hours to WMTX.

Furthermore, NNC maintains that it was improper and unnecessary for the Commission to reopen the administrative record and order the ALJ to take "additional evidence" on an issue that had been fully considered at the original hearing essentially allowing the Applicant a

“second bite at the apple.” NNC filed a Supplemental Motion for Rehearing on November 9, 2009 noting its objection to this remand. NNC incorporates the arguments put forth in its November 9, 2009 Supplemental Motion for Rehearing herein. NNC also incorporates all Exceptions submitted August 19, 2009 regarding the Proposal for Decision issued by ALJ Scudday after the original hearing on the merits.

Regarding the January 5, 2010 PFD, NNC specifically excepts to Findings of Fact Nos. 192, 193, 194, 195, 197, 198, 204, 205, 214, 215, 216, 217, 218, 219, 251, 254, and 255 and to Conclusions of Law Nos. 8, 9, 11, 37-39, and 51.

## **II. REMANDED ISSUE: OPERATING HOURS**

The issue of appropriate operating hours for the ACL facility was previously addressed at the original hearing for Waste Management’s Permit Application 249D. On February 15, 2008, pursuant to 30 T.A.C. § 55.210, Applicant requested the Commission to directly refer this proceeding to SOAH. 30 T.A.C. § 55.210(b) states that when an application is directly referred to SOAH, the scope of the hearing includes whether the “application complies with all applicable statutory and regulatory requirements.” 30 T.A.C. § 330.135(a) mandates that “the waste acceptance hours of a municipal solid waste facility may be any time between the hours of 7:00 a.m. and 7:00 p.m., Monday through Friday, unless otherwise approved in the authorization for the facility.” Accordingly, additional operating hours were clearly at issue for consideration at the hearing. If Applicant desired authorization to maintain operation hours beyond those identified in 30 T.A.C. § 330.135(a), then it was obligated to prove by the preponderance of the evidence it needed additional operating hours.

30 T.A.C. § 80.17(a) unequivocally places the burden of proof on the moving party. As acknowledged by ALJ Scudday in his September 11, 2009 letter to General Counsel of the

Commission, the moving party on operating hours is the Applicant.<sup>1</sup> ALJ Scudday concluded that Applicant simply failed to put forth sufficient evidence to support operation of the facility beyond hours identified in 30 T.A.C. § 330.135(a).

ALJ Scudday explicitly conveyed his fact findings as follows:

209. “Applicant has the burden of proof to show that the current operating hours for the Facility are appropriate.

210. There is insufficient evidence to show that the Facility’s current operational hours are appropriate.

211. Protestants established by a preponderance of evidence that the operating hours should be limited to the default hours of 7:00 a.m. to 7:00 p.m., Monday through Friday in order to mitigate the noise conditions that are inherent with the operation of an MSW landfill.”<sup>2</sup>

The decision by ALJ Scudday was not only premised on the lack of evidence presented by the Applicant, but also on Protestant testimony from Mr. Word, Mr. Guernsey and Mr. McAfee.<sup>3</sup>

ALJ Scudday cited testimony by Mr. Word concerning backup alarms on garbage trucks and construction equipment.<sup>4</sup> He further testified that the operations could be heard beyond the minimum 125 foot buffer requirement between waste disposal and the property boundary.<sup>5</sup> Mr. Guernsey’s explanation that such nuisance conditions generated by operation of the landfill could be mitigated if operating the landfill was restricted to daylight hours.<sup>6</sup> Mr. Guernsey’s recommendation, adopted by ALJ Scudday, is consistent with the Preamble of § 330.135(a),<sup>7</sup> that 7:00 a.m. to 7:00 p.m. operating hours are used because they include the time when most people are likely to be out of their residences at work or social activities....waste facility

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<sup>1</sup> See Scudday letter to Les Trobeman, TCEQ General Counsel, September 11, 2009.

<sup>2</sup> *Id.*

<sup>3</sup> PFD at 63.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> Preamble references § 330.118. This Section was renumbered 330.135 after the rule changes in 2006.

operations outside of these hours are more likely to disturb people in residential areas.<sup>8</sup> ALJ Scudday then cited Mr. McAfee's testimony, which is a prime example of citizens that stand to be impacted by noise, odor and dust associated with the landfill operations. Given the evidence presented at hearing, ALJ Scudday appropriately recommended limiting operation to the default hours 7:00 a.m. to 7:00 p.m., Monday through Friday, only.

At the remand hearing, Mr. McAfee, owner of the Barr Mansion, testified that his concerns about maintaining additional operating hours were similar to his general concerns of the landfill operations – “noise, odors, unsightliness, lights, traffic, health of myself, staff, clients and their guests.”<sup>9</sup> When questioned by ALJ Scudday, Mr. McAfee made clear that “because [the expansion is] closer to me, it'll be more noticeable. If they were operating on the other side of their landfill 24/6, I wouldn't -- it wouldn't be nearly the problem as it is.”<sup>10</sup> Not only will the nuisance conditions associated with the landfill operations intensify as they get closer, but Mr. McAfee also explained how operating hours beyond those set forth by rule coincide with the vast majority of the functions at the Barr Mansion.<sup>11</sup>

Mr. McAfee represents only one example of many citizens that stand to be adversely impacted and was not the only neighbor to testify regarding operations during additional hours. Also on behalf of NNC, Mr. Wilkins testified that from his property he can see bulldozers and the waste trucks on the ACL facility making noise.<sup>12</sup> Based on his encounters, he testified that the noise that can be heard from his property mostly comes from the ACL facility.<sup>13</sup> Combining the testimony of Mr. McAfee and Mr. Wilkins only confirms what ALJ Scudday previously

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<sup>8</sup> 29 TEX. REG. 11069 (Nov. 26, 2004).

<sup>9</sup> NNC Ex. MM-2, p.2:25 – 29.

<sup>10</sup> 16 TR. 2903:7 - 25 (McAfee).

<sup>11</sup> *Id.*

<sup>12</sup> 16 TR. 2851:4 – 15 (Wilkins).

<sup>13</sup> *Id.*

concluded in the original PFD - that the Applicant failed to meet its burden for maintaining operating hours in excess of those designated as default by 30 T.A.C. § 330.135.

In an attempt to rectify the failure to satisfy its burden at the original hearing, Waste Management has put forward new testimony. However, Applicant provided testimony that amounts to nothing more than “business needs, competitiveness, those kinds of things.”<sup>14</sup> The TCEQ has already stated it is “not authorized to consider the need for a municipal solid waste facility in deciding whether to issue a permit. The Commission is authorized to consider whether issuing a permit is incompatible with land use in the area.”<sup>15</sup> More specifically, “a 24-hour operation should not be authorized in a populated area, [and] the Commission can consider whether a facility is located in a residential area.”<sup>16</sup> Nowhere does the TCEQ mention authority to consider business needs in its determination of appropriateness of operating hours. Nowhere does Mr. Smith, Area Vice President for Waste Management of Texas, Inc. South Texas, or any witness for the Applicant, address the noise, odor and dust conditions for a heavily residential area that ALJ Scudday sought to mitigate in his original Proposal for Decision (“PFD”).<sup>17</sup> Although business needs may shed light on policy concerns for operating landfills prior to 7:00 a.m. and after 7:00 p.m., the determination for granting additional operating hours is determined on a case-by-case basis and focuses on compatibility.<sup>18</sup> The testimony submitted by the Applicant on remand simply does not address the appropriateness or compatibility of operating the ACL facility during these additional hours.

NNC referenced in its closing argument, and has restated, above, the Commission’s previous position on which criteria it may consider when determining appropriate operating

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<sup>14</sup> 16 TR. 2709:2 – 7 (Don Smith)

<sup>15</sup> 29 TEX. REG. 11069 - 70 (Nov. 26, 2004)

<sup>16</sup> *Id.* at 11070.

<sup>17</sup> PFD at 64.

<sup>18</sup> 29 TEX. REG. 11069 (Nov. 26, 2004).

hours.<sup>19</sup> ALJ Scudday omitted any discussion of whether the Commission is even permitted to consider business needs. In direct contradiction to the Commission's prior commentary, ALJ Scudday determined that while limiting the operating hours on weekdays would not have a tremendous impact on Applicant's current operations, it is clear that when the economy recovers and as growth continues, expanded hours will be needed.<sup>20</sup> Similarly, he concluded that operating hours on Saturday provides a needed service to the community.<sup>21</sup> More disconcerting was the failure to even mention the nuisance impacts ALJ Scudday held in his prior Proposal for Decision would occur during extended operating hours. At no point in either hearing did the Applicant present any evidence to mitigate those concerns. Nuisance conditions and compatibility with the land use in the area are what the Commission consistently stated are to be the deciding criteria for appropriate operating hours, not the business needs of the Applicant.

**a. TCEQ and its predecessors have had longstanding concerns with appropriateness of extended operating hours at the Austin Community Landfill.**

Evidence provided by Mr. Smith further exposed the longstanding concerns of the TCEQ predecessors for neighbors of the ACL facility. In his prefiled testimony, Mr. Smith included the original authorization from the Texas Department of Health ("TDH") for its extended operating hours.<sup>22</sup> Dated March 14, 1989, TDH issued approval for additional operating hours at the ACL facility, but cautioned that "at some future date you may be required to revert to the standard operating hours."<sup>23</sup> TDH was "particularly concerned about the operation on Sunday and will be giving particular attention to the public reaction to this activity."<sup>24</sup> Twenty years ago, a time

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<sup>19</sup> NNC Closing Argument citing 29 TEX. REG. 11,070 (Nov. 26, 2004).

<sup>20</sup> Remand PFD at 8.

<sup>21</sup> *Id.*

<sup>22</sup> APP-105

<sup>23</sup> *Id.* at 1

<sup>24</sup> *Id.*



when Mr. Smith agreed fewer residential units existed than today, the TDH was concerned with potential adverse impacts operation during weekend hours may cause.<sup>25</sup> Today, 1,147 residential units exist within one-mile of the facility. As the facility expands laterally getting closer to these residences, the impact will be felt by a much larger number of citizens affected and to a heightened degree of intensity.

Three years later, TDH approved additional operating hours for the ACL facility but maintained its warning that “at some future date you may be required to revert to the standard operating hours.”<sup>26</sup> Again, the surrounding land use demographics were much different seventeen years ago. Since 1992 there is no record of any evaluation conducted by the TCEQ or its predecessors of the appropriateness of extended operating hours at the ACL facility.

As Applicant points out, the TCEQ did approve the ACL modifications to the Site Operating Plan in 2007, which acknowledged the additional operating hours. However, it appears TCEQ did not conduct any evaluation of appropriateness and merely determined that the extended hours were previously permitted and no changes were being proposed.<sup>27</sup> Accordingly, despite the vast changes to the area over the years, this proceeding presents the first evaluation in seventeen years by the Commission, regarding the appropriateness and compatibility of extended operating hours at the ACL facility. These documents expose that land use was causing concerns for additional operating hours twenty years ago in a far more rural location. It seems far-fetched that extended operating hours would be appropriate in the same area that has experienced and continues to experience, undisputed exponential growth.

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<sup>25</sup> 16 TR. 2712:4 – 6 (Don Smith).

<sup>26</sup> APP-106 at 1

<sup>27</sup> APP-107 at 28

**b. Other Landfills operating with extended hours are distinct from the Austin Community Landfill.**

Applicant attempts to justify the currently permitted extended operating hours at the ACL facility with comparisons to the operating hours at other landfill facilities that operate during extended hours. First, Mr. Smith references the BFI Sunset Farms (“BFI”) facility as a similarly situated landfill that operates 24 hours per day. However, Mr. Smith omitted the crucial distinction that the BFI landfill will no longer be accepting waste as of the year 2015. In contrast, the ACL facility is anticipated to operate until approximately 2025.<sup>28</sup> Although Protestants certainly argued that the BFI landfill operating hours, and the facility in general, were incompatible just like the ACL facility, it is far less detrimental knowing it will be entirely shut down within six years.

Second, Mr. Smith references the Williamson County Recycling and Disposal Facility (“Williamson County RDF”) and the Mesquite Creek Landfill. Both landfills are operated by WMTX. He testified that the Williamson County RDF facility is authorized to accept waste from 5:00 a.m. to 8:00 p.m. Monday through Friday and Saturday from 6:00 a.m. to 4:00 p.m.<sup>29</sup> However, Mr. Smith did not include in his testimony that as of October 29, 2009 there were fewer than 150 residences located within a mile of the Williamson County RDF facility<sup>30</sup> – a stark contrast from the 1,147 residential units within a mile of the ACL facility. Mr. Smith also omitted any information regarding surrounding land use of the Mesquite Creek facility.

Finally, Mr. Smith points out that the Texas Disposal Systems Landfill (“TDS”) is authorized “to receive waste from commercial accounts 24 hours per day, Monday through Saturday, and may accept waste from the public between 7:00 a.m. to 7:00 p.m. Monday through

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<sup>28</sup> 2 TR. 87:1 – 6 (Don Smith)

<sup>29</sup> APP-100A at 9:28 - 9

<sup>30</sup> APP-109 at 6

Saturday.”<sup>31</sup> Again, Mr. Smith omits any land use comparison that would make this comparison useful for a compatibility comparison. Furthermore, according to the documents provided by Applicant, TDS is not permitted to operate at any point on Sundays.<sup>32</sup> Therefore, based on this comparison, there is no reason to believe the ACL facility should be allotted Sunday operating hours, either. All four landfills cited by Mr. Smith possess distinctive characteristics that may justify extended operating hours at these facilities, but highlight the inappropriateness of similar hours at the ACL facility.

The four facilities cited by Mr. Smith also demonstrate the ability to accommodate any waste reception that Applicant alleges the ACL facility would no longer be able to service if operating hours were limited to standard hours. Interestingly, Mr. Smith agreed that this “wouldn’t be a significant portion” of waste in comparison to amount of waste received during the standard operating hours.<sup>33</sup> Moreover, all four landfills cited by Mr. Smith have vast capacity remaining to accept waste. Specifically, Mr. Smith made clear it is “safer to say there is more [waste capacity] at Williamson County [RDF] than there is at ACL,”<sup>34</sup> and the Mesquite Creek has “approximately 23 years” of waste capacity remaining.<sup>35</sup> Waste accommodations for the City of Austin and other early morning customers of the ACL facility could be maintained without the catastrophic scenario for trucks lined up at the ACL facility, traffic, safety and inconvenience presented by the Applicant. In 2004, the TCEQ addressed these concerns expressed by Waste Management and determined that “the extended operating hours for when materials may be transported on or off site, and hours when heavy equipment may operate enables a facility to make full use of its waste acceptance hours. A facility can use those hours

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<sup>31</sup> APP-100A at 11:1 – 3 (Don Smith)

<sup>32</sup> *Id.*

<sup>33</sup> 16 TR. 2718:20 – 23 (Don Smith).

<sup>34</sup> *Id.* at 2717:11 – 13 (Don Smith).

<sup>35</sup> *Id.* at 2717:19 – 22 (Don Smith).

outside of its waste acceptance hours so it can be ready to receive waste upon opening the gates and can continue to receive waste up until closing its gate.”<sup>36</sup>

Applicant is merely utilizing a scare-tactic predicting an exaggerated nightmare scenario to disguise its ulterior concerns, which are its ability to compete in the landfill business and generate revenue. Two of these facilities are operated by WMTX, which cuts against any suggestion that limiting operating hours at the ACL facility would greatly impact Waste Management’s revenue or competitive position.

**c. Vast majority of waste received at the Austin Community Landfill will remain unaffected.**

James Smith, Senior District Landfill Manager for ACL, testified regarding the specific number of loads received at ACL over an approximate two-year period.<sup>37</sup> Mr. Smith relied on a spreadsheet created by the software program, Fast Lane, to determine percentages of loads received with the corresponding hour of the day.<sup>38</sup> After reviewing the spreadsheet, Mr. Smith conceded that “86% [of loads] accepted [at the ACL facility] will be unaffected by the restriction of 7:00 a.m. to 7:00 p.m. operating hours.”<sup>39</sup> It appears that Mr. Smith included Saturday operating hours in this percentage.<sup>40</sup> According to the Fast Lane spreadsheet, 9.55% of waste loads accepted at the ACL occur on Saturdays.<sup>41</sup> In the two years reflected in the Fast Lane data, there was not one load of waste accepted at the ACL facility on a Sunday.<sup>42</sup> As a result, limiting the ACL facility to standard operating hours will leave 77.45% of ACL operations unaffected. Hypothetically, if the Commission granted one extra hour from Monday through Friday from 6:00 a.m. to 7:00 p.m., and an extra hour or two on Saturday, the ACL facility would remain

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<sup>36</sup> 29 TEX. REG. 11069 (Nov. 26, 2004).

<sup>37</sup> APP-1201.

<sup>38</sup> *Id.*

<sup>39</sup> 16 TR. 2841:19 – 25 (James Smith).

<sup>40</sup> APP-1201.

<sup>41</sup> APP-1201 at 1 (James Smith)

<sup>42</sup> *Id.*

more than 80% unaffected.<sup>43</sup> The large amount of business operations that would be unaffected by default operating hours, coupled with the availability at other landfills (two operated by Waste Management) does not indicate an insurmountable inconvenience to Waste Management or its customers. It certainly does not outweigh the mitigation that would be provided to the citizens.

### III. TRANSCRIPT COSTS

NNC is in agreement with the ALJ that transcript cost for this remanded proceedings be allocated to the Applicant.

### IV. CONCLUSION

Extended operating hours beyond the default hours set forth in 30 T.A.C. § 330.135 must be specifically authorized by the Commission. The Commission has made clear the default hours are intended to reflect “the times when most people are likely to be out of their residences at work or social activities.”<sup>44</sup> The Commission commented at the 2004 Rulemaking that they are “not authorized to consider the need for a municipal solid waste facility”<sup>45</sup> but are “authorized to consider whether issuing a permit is incompatible with land use in the area.”<sup>46</sup> Applicant’s interpretation of the variables the Commission is to consider when evaluating appropriateness of operating hours is overbroad. Waste Management’s business needs are not only irrelevant and unpersuasive, but ALJ Scudday’s recommendation otherwise is a direct contradiction of TCEQ policy. It is undisputed, however, that the vast majority of waste loads accepted by the ACL will remain unaffected by limiting operations to the default hours. Accordingly, not even business needs of Waste Management outweigh the nuisance conditions

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<sup>43</sup> *Id.*

<sup>44</sup> 29 TEX. REG. 11,069 (Nov. 26, 2004).

<sup>45</sup> 29 TEX. REG. 11,069 (Nov. 26, 2004).

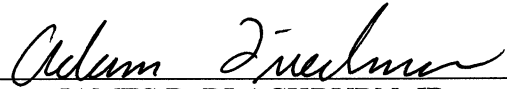
<sup>46</sup> 29 TEX. REG. 11,069 - 70 (Nov. 26, 2004).

facing the neighbors that are associated with operating the landfill during evening and weekend hours.

So that the surrounding community of the ACL facility is afforded some protection and the ability to enjoy their properties, NNC respectfully requests that the Commission order that the operating hours of the ACL facility be 7:00 a.m. to 7:00 p.m., Monday through Friday, only.

Respectfully submitted,

BLACKBURN CARTER, P.C.

by 

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## CERTIFICATE OF SERVICE

On this 25th day of January, 2010, a true and correct copy of the foregoing instrument was served on all attorneys of record by the undersigned via regular U.S. Mail, and/or facsimile transmission, and/or Federal Express Overnight Mail, and/or electronic mail (e-mail).

  
Adam M. Friedman

The Honorable Roy Scudday  
Administrative Law Judge  
State Office of Administrative Hearings  
300 West 15th Street, Ste. 502  
Austin, Texas 78711  
*Via Facsimile & Federal Express*

FOR THE CHIEF CLERK:

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